No. 96-1152

Supreme Court, U.S.
F I L E D
MAR 24 1997

In The

# Supreme Court of the United States

October Term, 1996

JOHN P. SHELTON; ACI INVESTORS PROTECTIVE ASSOCIATION, AND 155 OTHER DEFRAUDED REAL ESTATE INVESTORS IN AMERICAN CAPITAL INVESTMENTS, INC.,

*Petitioners,*

*vs.*

WILLIE BARNES, as successor to RICHARD G. SHAFFER, Receiver for AMERICAN CAPITAL INVESTMENTS, INC.; and the SECURITIES AND EXCHANGE COMMISSION,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

CHARLES E. SLYNGSTAD
*Counsel of Record*
MUSICK, PEELER & GARRETT LLP
*Attorneys for Respondent*
One Wilshire Boulevard
Suite 2000
Los Angeles, California 90017-3321
(213) 629-7863

70828
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

## QUESTIONS PRESENTED

Although the questions presented do not merit review by this Court for reasons expressed *infra*, Respondent restates the appropriate questions:

(1) Given that 28 U.S.C. § 754 vests a district court receiver with "complete jurisdiction and control" over "all" real properties involved in a federal equity receivership, was it error for the Ninth Circuit to conclude — as a matter "firmly rooted in the common law of equity receiverships" — that § 754 includes the power to sell a receivership estate's properties over the suspect state law ownership claims of certain receivership-estate investors who were *de facto* parties to the underlying proceedings?

(2) In the context of considering four consolidated appeals — three of which raised complex appellate jurisdictional issues, and two of which were previously dismissed by the Ninth Circuit for lack of appellate jurisdiction — was there any prejudicial error caused by the Ninth Circuit's use of the "assumed hypothetical jurisdiction" doctrine to dispose of all four appeals on the merits?

## LIST OF INTERESTED PARTIES

The actual Petitioners before the Court are unknown to the Respondent, though the Petitioners listed in the Petition are investors involved in the lower court proceedings.

The Respondent is Willie R. Barnes, Successor Receiver. Mr. Barnes succeeded the late Richard G. Shaffer. Charles E. Slyngstad of Musick, Peeler & Garrett LLP is counsel of record for the Respondent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| List of Interested Parties | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Introduction | 1 |
| Statutory Provisions Involved | 2 |
| Statement of Facts | 3 |
| A. The ACI Receivership | 3 |
| B. The Sale of the ACI Receivership Properties | 4 |
| C. The Appeals of the Receivership Sales Orders | 5 |
| Reasons for Denying the Writ | 7 |
| I. The Ninth Circuit Did Not Expand Or Create Federal Common Law. | 7 |
| II. The Ninth Circuit Did Not Contradict *O'Melveny* And Its Progeny. | 9 |

*Contents*

*Page*

III. The Ninth Circuit Did Not Act Improperly By Taking "Assumed Jurisdiction" Over The Appeals. ..... 10

Conclusion ..... 12

## TABLE OF CITATIONS

**Cases Cited:**

*Atherton v. F.D.I.C.*, __ U.S. __, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997) ..... 9

*Brown v. Swann*, 35 U.S. (10 Pet.) 497 (1836) ..... 1, 8

*Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2nd Cir. 1990) ..... 11

*Clow v. United States Dept. Housing and Urban Develop.*, 948 F.2d 614 (9th Cir. 1991) ..... 11

*Cross-Sound Ferry Services, Inc. v. I.C.C.*, 934 F.2d 327 (D.C. Cir. 1991) ..... 11

*First Nat'l Bank v. Shedd*, 121 U.S. 74 (1887) ..... 1, 8

*In re Valley Steel Products Co.*, 157 B.R. 442 (Bankr. E.D. Mo. 1993) ..... 8

*Matter of Scott Housing Systems, Inc.*, 91 B.R. 190 (Bankr. S.D. Ga. 1988) ..... 8

*Contents*


| | Page |
|---|---|
| *Norton v. Mathews*, 427 U.S. 524, 96 S. Ct. 2771, 49 L. Ed. 2d 672 (1976) | 11 |
| *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) | 9, 10 |
| *Reebok Int'l v. Marnatech Enter., Inc.*, 970 F.2d 552 (9th Cir. 1992) | 1, 8 |
| *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313 (7th Cir. 1995) | 11 |
| *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600 (9th Cir. 1978) | 1, 8 |
| *Switlik v. Hardwicke Co., Inc.*, 651 F.2d 852 (3rd Cir.), *cert. denied*, 454 U.S. 1064 (1981) | 11 |
| *United States v. Stoller*, 78 F.3d 710 (1st Cir.), *cert. dismissed*, 117 S. Ct. 378 (1996) | 11 |
| *United States v. Weathersby*, 958 F.2d 65 (5th Cir. 1992) | 11 |

**Statutes Cited:**

| | |
|---|---|
| 12 U.S.C. § 1821(k) | 9 |
| 28 U.S.C. § 754 | i, 1, 2, 3, 4, 7 |
| 28 U.S.C. § 959 | 2, 8 |
| 28 U.S.C. § 959(b) | 8, 9 |

*Contents*

*Page*

**Rules Cited:**

Federal Rule of Appellate Procedure 4(a)(1) ..... 5

Federal Rule of Civil Procedure 60 ..... 5, 6

**Other Authorities Cited:**

2 *Clark on Receivers Sections:*

342 ..... 1, 8

344 ..... 1,8

482 ..... 1, 8

482(a) ..... 2, 8

487 ..... 2, 8

489 ..... 2, 8

491 ..... 2, 8

3 *Clark on Receivers Section:*

920 ..... 2, 8

## INTRODUCTION

Respondent, the district court-appointed Receiver of American Capital Investments, Inc., its affiliates, and their property ("ACI"), hereby opposes the Petition for Writ of Certiorari on the grounds that there are no important federal questions presented, no apparent conflicts in any circuits, and no issues worthy of consideration by this Court.

The Petitioners are defrauded investors. Petition for Writ of Certiorari ("Petition"), Appendix A ("Ninth Circuit Opinion") at 4a. These Petitioners were intimately involved in the district court's proceedings below by virtue of their numerous unsuccessful attacks on the receivership. They now maintain this appeal only by grossly misrepresenting the factual record and the Ninth Circuit's opinion.

The Ninth Circuit did *not* "declare[ ] by fiat that there is a federal common law of receiverships which permits any federal court receiver to disregard state created property rights and state limits on the powers of a receiver, without a showing of a compelling federal interest and in contravention of a federal statute mandating the use of state law." Petition at 2-3 (emphasis removed).

The Ninth Circuit merely concluded that a receiver's power to sell receivership estate properties was "within the scope of a receiver's 'complete control' over receivership assets under § 754, a conclusion firmly rooted in the common law of equity receiverships." *See* Petition, Appendix A at 20a-22a (Ninth Circuit Opinion, citing *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978); *Reebok Int'l v. Marnatech Enter., Inc.*, 970 F.2d 552, 561-62 (9th Cir. 1992)(quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)); *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887); 2 *Clark on Receivers* §§ 342, 344, 482,

482(a), 487, 489, 491 (3d ed. 1992); 3 *Id.* § 920). That decision was correct, unremarkable, and consistent with state law.

The Petitioners' arguments of error based on "assumed appellate jurisdiction" have even less merit. More than a year before the Ninth Circuit decided the four consolidated appeals, the court granted the Receiver's motion to dismiss two of the appeals as non-final orders over which there was no appellate jurisdiction. Petition at 9. The Ninth Circuit later elected to reinstate the two appeals — without affirmatively ruling on the jurisdictional issues — and consolidate them with two other related appeals, one of which also raised complex jurisdictional issues. Thus, in consolidating and reinstating the appeals, the Ninth Circuit still left open the difficult questions of whether there was appropriate appellate jurisdiction over three of the four appeals. By assuming, *arguendo*, that there was jurisdiction over all of the appeals, the Ninth Circuit gave the Petitioners the benefit of considerable doubt on that issue.

## STATUTORY PROVISIONS INVOLVED

In addition to 28 U.S.C. § 959 (cited by Petitioners), the following statute is also at issue:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

28 U.S.C. § 754.

## STATEMENT OF FACTS

### A. The ACI Receivership

The district court placed ACI in a federal equity receivership pursuant to the complaint and application of the Securities and Exchange Commission ("SEC"). The SEC alleged that ACI violated federal securities laws through sales of interests in real estate investments. The SEC asked the district court to appoint a receiver to take control of all ACI-related assets. Ninth Circuit Opinion at 3a.

The district court appointed Richard G. Shaffer as Receiver,[1] and empowered him, pursuant to 28 U.S.C. § 754, to take possession and control of all assets "belonging to or in the possession or control of ACI and its subsidiaries and affiliates." Ninth Circuit Opinion at 3a.

The fraudfeasors who operated ACI ran a scheme that purported to offer investors joint ventures and limited partnerships in specific real estate projects. ACI guaranteed these investors inflated "profits" that could be — and often were — rolled over and reinvested. In reality, each investor's money went into a commingled pool that was used to purchase properties, pay off some early investors, and make various extravagant or otherwise improper purchases. The commingling of the funds made it impossible to trace which monies went toward which real estate purchases. At the time of the ACI receivership, ACI owed investors an amount which greatly exceeded the actual equity of ACI's real estate investments. Ninth Circuit Opinion at 4a.

---

1. Mr. Shaffer served as Receiver throughout nearly all of the events at issue. He passed away while these appeals were pending and was succeeded by the present Receiver, Willie R. Barnes, an attorney and former Commissioner of Corporations for the State of California.

**B. The Sale of the ACI Receivership Properties**

Of the eight ACI receivership estate properties, five were wholly owned by ACI and three were jointly held by ACI and three limited partnerships. Ninth Circuit Opinion at 5a. Thus, the Receiver controlled all eight properties pursuant to the district court's § 754 authority.

Due primarily to the commingled investor funds and the liens of secured creditors, the Receiver determined that the best course of action was to sell all eight properties to a private buyer, JH Financial Group or nominee ("JH"), and distribute the proceeds as equitably as possible to all of ACI's defrauded investors, including the Petitioners. In its order confirming the sale, the district court specifically found that the sale was "in the best interests of the ACI estate." Petition, Appendix C ("Sale Order") at 45a. The court also noted that "[t]he best interests of the estate includes not only the interests of the investors, but also the interests of ACI's creditors. . . ." Sale Order at 44a.

In a letter circulated among themselves, and which the Ninth Circuit specifically referenced, the Petitioners agreed that all of ACI's investors should be treated as equally as possible, whether their interests were in the form of deeds, limited partnership interests, or preferred shares in ACI or affiliated entities. Ninth Circuit Opinion at 4a-5a and n.1. Thus, even the Petitioners agreed that equity favored treating *all* investors equally.

The Petitioners, however, opposed the JH sale because they wanted to hold on to the properties in the vain hope of realizing the inflated profits they were originally promised. They attacked the JH sale in any way possible. Ninth Circuit Opinion at 4a. However, the Petitioners have never represented all of ACI's investors, nor any of ACI's secured or unsecured creditors. Thus,

they were *never* "the only parties holding an interest in the real estate." Petition at 3. Nor were they *ever* the "the sole parties entitled to ownership of the real estate." Petition at 4.

**C. The Appeals of the Receivership Sale Orders**

The Receiver continued to pursue the JH sale, and this produced the four district court orders giving rise to the consolidated appeals before the Ninth Circuit: (1) the Sale Order confirming the sale; (2) the Rule 60 Order denying the Petitioners' request to set aside the Sale Order; (3) the Addendum Order authorizing an addendum to the sale agreement; and (4) the Transfer Order transferring the claims of all investors to the sale proceeds. Ninth Circuit Opinion at 3a.

Around the same time, the Receiver also moved for permission to treat all ACI investors equally in the division of the sale proceeds. The Petitioners did not oppose this motion, presumably for reasons consistent with the letter they circulated among themselves, and which is noted *supra*. The district court thus issued the Equal Treatment Order allowing the Receiver to give each investor a pro-rata share of the sale proceeds based on each investor's net investment. No investor appealed the Equal Treatment Order. Ninth Circuit Opinion at 4a-5a.

The Receiver moved to dismiss the appeals of the Sale Order and the Rule 60 Order on the grounds that they were non-final interlocutory appeals. The Receiver also asserted that the Sale Order appeal was untimely under the 30-day provision of F.R.A.P. 4(a)(1), and it was *not* entitled to the special 60-day government provision because the SEC was not a party to the appeal.

In late April of 1995, the Ninth Circuit granted the Receiver's dismissal motions on the grounds that the Sale Order

and Rule 60 Order were non-final judgments. Petition at 9. The Ninth Circuit did not rule on the timeliness question.

In early May of 1995 — before the Ninth Circuit issued mandate on the dismissal of the Sale Order and the Rule 60 Order — the district court issued — based on its residual jurisdiction over the JH sale and its need to preserve the status quo — the Addendum Order and Transfer Order. Ninth Circuit Opinion at 24a-25a. The Receiver pursued these latter orders to combat other emergent battlefronts arising out of the Petitioners' "wide-ranging, extrajudicial campaign to thwart the [JH] sale's closing." Ninth Circuit Opinion at 7a. The JH sale, however, closed in June of 1995. Ninth Circuit Opinion at 8a.

At all significant times, the Petitioners were *de facto* parties to the district court receivership proceedings by virtue of their numerous appearances, their satisfaction of the jurisdictional minimum contacts test, and their receipt of full notice and opportunity to be heard at every critical stage. Ninth Circuit Opinion at 20a, 27a.

After the investors petitioned for a rehearing of the dismissal of the Sale Order and Rule 60 Order appeals, the Ninth Circuit reinstated those appeals in August of 1995 without any comment on the jurisdictional issues. Thus, it is *false* for the Petitioners to now claim that the Ninth Circuit "reversed itself when it initially incorrectly dismissed the Investors' appeals." Petition at 11. The Ninth Circuit never resolved that issue.

When those appeals were later consolidated with the appeals of the Addendum Order and the Transfer Order, the Receiver, in his substantive appellate brief, once again raised the same appellate jurisdictional objections regarding the Sale Order and the Rule 60 Order. The Receiver also challenged the Addendum Order as a non-final interlocutory appeal, and he argued that all

three of the appeals were mooted by the sale's closing. The Ninth Circuit's opinion clearly indicated that all of the Receiver's objections presented *live* "close questions of appellate jurisdiction." Ninth Circuit Opinion at 9a.

## REASONS FOR DENYING THE WRIT

### I.

### THE NINTH CIRCUIT DID NOT EXPAND OR CREATE FEDERAL COMMON LAW.

Remarkably, the Petitioners fail to even mention — much less address — the one federal statute expressly relied upon by the Ninth Circuit in support of its decision below, 28 U.S.C. § 754.

Contrary to the Petitioners' assertions, the Ninth Circuit did *not* rule that a district court has the power, under federal common law, to sell receivership property over the Petitioners' suspect state law ownership claims. Nor can it plausibly be argued that the Ninth Circuit enunciated the principle "that a federal court supervising any federal receivership may create and apply its own federal common law to displace state-created substantive property rights of co-owners of property in the hands of a receiver." Petition at 23.

The Ninth Circuit merely concluded that a federal equity receiver had the power, pursuant to his "complete control" under § 754, to sell the assets of the receivership estate, and this was "a conclusion firmly rooted in the common law of equity receiverships." Ninth Circuit Opinion at 20a. Furthermore, the Ninth Circuit also noted this conclusion was fully consistent with state law. Ninth Circuit Opinion at 23a and n.17.

The Ninth Circuit relied on a wealth of authority to support its limited proposition. *See* Ninth Circuit Opinion at 20a-22a (citing *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978); *Reebok Int'l v. Marnatech Enter., Inc.*, 970 F.2d 552, 561-62 (9th Cir. 1992) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)); *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887); 2 *Clark on Receivers* §§ 342, 344, 482, 482(a), 487, 489, 491 (3d ed. 1992); 3 *Id.* § 920). The proposition logically follows from the well-recognized principle that "the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Lincoln Thrift Ass'n, supra*, 577 F.2d at 606. Thus, it is absolutely false for the Petitioners to claim that the "Sole Cited Basis" for this conclusion was a "Misquoted Treatise on Receiverships." Petition at 26.

In reaching its conclusion, the Ninth Circuit expressly ruled that the Receiver's exercise of his power to sell the assets of the receivership estate was *not* governed by 28 U.S.C. § 959(b), because the Receiver was not acting as the business agent of ACI. Ninth Circuit Opinion at 20a. This ruling was correct. Section 959(b) only applies when the Receiver acts to "manage and operate the property in his possession" as if he were "*carrying on business*". 28 U.S.C. § 959 (emphasis added). When he does so, he acts as an agent of the business. Section 959(b) does not apply when the Receiver acts to sell or liquidate the assets of the receivership estate, because that is not the conduct of an agent acting to manage and operate the business of the receivership entity. *See In re Valley Steel Products Co.*, 157 B.R. 442, 447 (Bankr. E.D. Mo. 1993); *Matter of Scott Housing Systems, Inc.*, 91 B.R. 190, 195-196 (Bankr. S.D. Ga. 1988).

If § 959(b) does not apply, then there is no question whether the Receiver is acting to manage and operate the receivership

properties "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b). If there is no such question, then there is no potential issue about a conflict between state and federal law.

## II.

## THE NINTH CIRCUIT DID NOT CONTRADICT *O'MELVENY* AND ITS PROGENY.

The Petitioners misstate the holdings of *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994), and *Atherton v. F.D.I.C.*, __ U.S. __, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997). *O'Melveny* held that:

> in a suit by the [FDIC] as receiver of a federally insured bank, it is a . . . state-law [rather than a federal-law] rule of decision that governs the tort liability of attorneys who provided services to the bank.[2]

*Atherton* held that state law sets the standard of conduct for officers and directors of federally insured savings institutions as long as the state standard (such as simple negligence) is stricter than that of 12 U.S.C. § 1821(k) (which makes a director or officer of a federally insured bank potentially liable for gross negligence). The federal statute nonetheless sets a gross negligence floor.[3]

Neither case "held that federal common law should not be

---

2. 512 U.S. at 80-81, 89, 114 S. Ct. at 2051, 2056.

3. 117 S. Ct. at 674-676, 136 L. Ed. 2d 656.

applied except in the rarest of instances, and only after applying the tests set forth in *Kimbell Foods* and *O'Melveny*." Petition at 12.

Moreover, in its decision below, the Ninth Circuit expressly distinguished *O'Melveny*:

> *O'Melveny* does not control the instant case. *O'Melveny* concerned only the rule which governs a receiver's prosecution of claims on behalf of the corporation under its control — a fact situation with absolutely no relevance to this case. *O'Melveny* does not question the existence of other federal common law rules regarding the powers of equity receiverships. [The Petitioners'] assertion that 'there is no federal common law of receiverships' is thus vastly overstated. As discussed above, the powers of sale of federal equity receivers are well established.[4]

Thus, the Ninth Circuit did *not* defy *O'Melveny* and its progeny, and its decision below was *not* "far-reaching and extraordinary." Petition at 12.

## III.

## THE NINTH CIRCUIT DID NOT ACT IMPROPERLY BY TAKING "ASSUMED JURISDICTION" OVER THE APPEALS.

It is unclear precisely why the Petitioners take issue with the Ninth Circuit's use of "hypothetical jurisdiction" to enable the court to consider the appeals on their merits instead of

---

4. Ninth Circuit Opinion at 23a (footnote omitted).

dismissing them on jurisdictional grounds. The hypothetical jurisdiction doctrine is clearly a valid one which has been applied by the majority of Courts of Appeals[5] after being created by this Court in *Norton v. Mathews*, 427 U.S. 524, 96 S. Ct. 2771, 49 L. Ed. 2d 672 (1976).

By all accounts, the doctrine is applicable where the jurisdictional questions are difficult and the decision on the merits is clearly against the party asserting appellate jurisdiction and is not a function of that jurisdictional question. Here, those elements were plainly satisfied. The Receiver and the Petitioners sharply contested whether one of the appeals was untimely, whether three of the appeals were non-appealable interlocutory orders, and whether three of the appeals were mooted by the sale's closing. The Ninth Circuit had previously dismissed two of the appeals as non-final, only to reinstate them later. Moreover, the Ninth Circuit's decision on the merits was clearly and soundly against the Petitioners and was not dependent upon the outcome of the jurisdictional question.

It is difficult to see how application of the doctrine was improper, much less how the Petitioners were harmed by it.

---

5. *See, e.g., United States v. Stoller*, 78 F.3d 710, 715 (1st Cir.), *cert. dismissed*, 117 S. Ct. 378 (1996); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1316 (7th Cir. 1995); *Cross-Sound Ferry Services, Inc. v. I.C.C.*, 934 F.2d 327, 333 (D.C. Cir. 1991); *United States v. Weathersby*, 958 F.2d 65, 66 (5th Cir. 1992); *Clow v. United States Dept. Housing and Urban Develop.*, 948 F.2d 614, 616-17 n.2 (9th Cir. 1991); *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 154-160 (2nd Cir. 1990); *Switlik v. Hardwicke Co., Inc.*, 651 F.2d 852, 856 n.3 (3rd Cir.), *cert. denied*, 454 U.S. 1064 (1981).

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES E. SLYNGSTAD
*Counsel of Record*
MUSICK, PEELER & GARRETT LLP
*Attorneys for Respondent*
One Wilshire Boulevard
Suite 2000
Los Angeles, California 90017-3321
(213) 629-7863